CURRENT LEGISLATION

MINORITY OR PROPORTIONAL REPRESENTATION.—In *Wattles* v. *Upjohn* (1920) 179 N. W. 335, the Supreme Court of Michigan recently decided that a clause in the charter of the city of Kalamazoo[1] providing for the Hare system of minority or proportional representation[2] in the election of members of its governing body was unconstitutional. This conclusion was reached by an adherence to the reasoning announced in the leading cases of *Maynard* v. *Board of Canvassers*[3] and *Brown* v. *Smallwood*,[4] sanctioning a very questionable use of judicial power[5] and serving to perpetuate by purely formalistic reasoning the evils of the existing method of popular representation.

Broadly speaking the purpose of the various plans for minority representation has been to provide an electoral system whereby each political party or group controls in the governmental body elected such a proportion of the members as the vote of the party or group bears to the total vote cast. More specifically, the object has been to prevent the election of practically all the members of one party simply because that party has a slight majority in each district, county, ward, borough or other unit of representation, thus leaving a substantial portion of the body of voters entirely unrepresented.[6] Of the many plans offered to effect this highly desirable result, those which have arisen before the courts of this country on the question of constitutionality may be divided into three classes: (1) the restricted vote,[7] (2) the cumulative vote,[8] and (3) the preferential vote.[9] The distinction between

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[1] The material clauses of the charter, sections 41 and 183, are set out in full on pages 336 to 338 of the opinion.

[2] An explanation of the objects, methods and practical results of the Hare system together with a short argument showing its superiority over other electoral systems will be found in Leaflet No. 5 of the American Proportional Representation League, Philadelphia, Pa. (5th ed. Nov. 1919); Proportional Representation Review, Jan. 1919, Supplement; *ibid.* April, 1919, Supplement. According to Leaflet No. 5, *supra*, the Hare system has been adopted in Tasmania (1896, 1907), So. Africa (1909), Transvaal (1914), Ireland (1914), Ashtabula, Ohio (1915), New Zealand (1915), Sydney, Aust. (1916), Durban, So. Africa (1916), Calgary, Alberta (1916), Boulder, Colo. (1917), Brit. Columbia (1917), Great Britain, Eleven Seats in the Commons (1918), Scotland, School Boards (1918), New South Wales (1918), Many Private Organizations.

[3] (1890) 84 Mich. 228, 47 N. W. 756.

[4] (1915) 130 Minn. 492, 153 N. W. 953, commented on in (1915) 29 Harvard Law Rev. 213; (1915) 14 Michigan Law Rev. 74.

[5] See dissenting opinion of Cahill, J., in the *Maynard* case, *supra*, footnote 3. *Cf.* Commons, *Proportional Representation* (2nd ed. 1907) 6.

[6] See Commons, *op. cit.*; Asworth, *Proportional Representation Applied to Party Government* (1900); Forney, *Proportional Representation* (1900), and *Political Reform by the Representation of Minorities* (1894); Cooling, *Public Policy* (1916) 21-50; Speech of J. S. Mill in the House of Commons, May 29, 1867, 187 Hansard, *Parliamentary Debates* (3rd Series) 1343; Dutcher, *Minority or Proportional Representation* (1872). Perhaps fifteen different plans have been suggested at various times.

[7] See Dutcher, *op. cit.* 101. Each elector has a smaller number of votes than there are officers to be elected and can give but one vote to a candidate. If there are three to be elected, each elector can vote for only two; if five to be elected, each has three votes, *etc.*

[8] "The cumulative vote gives every elector as many votes as there are persons to be chosen in his district, with liberty to bestow all those votes upon one candidate, or distribute them among several, in such proportions as he may see fit". Dutcher, *op. cit.* 66. The Illinois Constitution, Art. IV, Secs. 7 & 8, provides for the election of the members of the House of Representa-

these various plans is of importance. Cases deciding that one plan is unconstitutional are not conclusive of the constitutionality of all types of minority representation legislation in that jurisdiction. The constitution of each state must be examined in the light of the particular legislation in question in order that a sound conclusion be reached.

Thus under a constitution providing that every qualified voter "shall be entitled to vote for all officers . . elective by the people",[10] a statute calling for the use of the restricted vote is probably flying in the face of the language of the constitution.[11] The Ohio court in *State* v. *Constantine,*[12] acting under a simple provision that every voter "shall be entitled to vote at all elections",[13] looked beyond the words of the provision itself and held the restricted vote unconstitutional. It based its decision on the ground that at the time the constitution was adopted, no scheme of minority representation was known, and that therefore the framers intended every elector to have the right to vote for every officer to be elected. On the other hand, under a provision corresponding word for word with the Ohio constitution,[14] the Pennsylvania court refused to extend the scope of the language itself and held

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tives by the cumulative voting system. A primary election for the selection of candidates for the legislature is an "election" within this provision. *People ex rel. Espey* v. *Deneen* (1910) 247 Ill. 289, 93 N. E. 437; *Rouse* v. *Thompson* (1907) 228 Ill. 522, 81 N. E. 1109. In order to protect minority stockholders, the privilege or right to the use of the cumulative vote in the election of corporate officers has been granted either by statute or by constitutional provision in the following states: Cal., Idaho, Ill., Kan., Ky., Mich., Miss., Mo., Mont., Neb., N. C., N. D., Ohio, Pa., S. D., W. Va. See Fletcher, *Cyclopedia Corporations* (1917) § 1682; Cook, *Corporations* (6th ed. 1908) § 609a.

[9] The Hare system is fully set out in the opinion of the court in the principal case. Its main features can be but briefly indicated here. Each elector is to indicate his first, second and additional choices opposite the names of the candidates. The total number of ballots cast is then divided by a number greater by one than the number of officers to be elected. The next whole number larger than the resulting quotient is deemed the "quota of constituency" or number necessary for election. Any candidate receiving that number of first choices is deemed elected. Each ballot received by a successful candidate above the quota is transferred to the candidate indicated as the second choice thereon. The ballots to be transferred are taken at random. If, after any transfer, no candidate has attained the quota, the ballots of that candidate having least votes are transferred to the next choice indicated thereon. This process is continued until the desired number of candidates have been elected, the number of votes remaining uncounted being less than the quota of election.

[10] N. J., Const., Art. II, Sec. 1.

[11] *McArdle* v. *Jersey City* (1901) 66 N. J. L. 590, 49 Atl. 1013; *State ex rel. Bowden* v. *Bedell* (1902) 68 N. J. L. 451, 53 Atl. 198; *Smith* v. *Perth Amboy* (1903) 70 N. J. L. 194, 56 Atl. 145. Similarly where all electors could vote "in the election of all civil officers". R. I., Const., Art. II, Sec. 1. *In re Opinion of Judges* (1898) 21 R. I. 579, 41 Atl. 1009. But the legislature may provide by statute for the election in any manner it sees fit of any officer created by statute and not mentioned in the constitution. The constitutional sections limiting the legislature's power to vary the voter's qualifications and electoral methods are construed as referring only to the election of officers specifically mentioned in the constitution. *Scown* v. *Czarnecki* (1914) 264 Ill. 305, 106 N. E. 276. Therefore in the New Jersey and Rhode Island cases, *supra,* the provision for proportional representation could have been held valid despite the constitutional provisions quoted since the officers to be chosen were local and not provided for in the constitution.

[12] (1884) 42 Oh. St. 437.

[13] Ohio, Const. Art. V.

[14] Pa., Const., Art. VIII, Sec. 1.

the restricted vote valid.[15] These cases illustrate the two alternative courses that may be pursued at least in states, the constitutions of which do not specifically give to their electors the right to vote for every officer; the court either will apply a literal and strict interpretation in accord with the progressive attitude of the Pennsylvania court toward political reform, or will follow Ohio in its satisfaction with conservative and traditional methods.

Cumulative voting was held unconstitutional in *Maynard* v. *Board of Canvassers,*[16] on the expressed ground that it was not in accord with the constitutional guarantees of a republican form of government. The soundness of this argument ultimately rests on the assumption made by the court that the constitution guarantees to every elector that his vote shall count with exactly the same weight and in exactly the same manner as the vote of every other elector. That such an assumption is unsound may best be proved by two examples to the contrary under our present electoral system. In the last New York state election, there were nine Supreme Court Justices to be elected in the first judicial district, and each elector had the privilege of casting nine votes. Had one elector chosen to vote for five only, it would be preposterous for a court to say that his constitutional guarantee had been violated because the vote of another elector, who had voted for all nine judges, was of more weight than his. The inequality in this case, as in cumulative voting, is due not to the statutory system of voting but to the failure on the elector's part fully to exercise his privilege. Moreover, if an exact equality of privilege is necessary, how is the constitutionality of the present general system to be explained since the votes of the electors of the minority party have no weight at all? In a district having 7000 voters, if 4000 vote for candidates A, B & C, and 3000 for D, E & F, thereby electing the former three, it surely cannot be claimed that the votes of those voting for D, E & F are of equal weight with those voting for the elected A, B & C. The answer in all cases is that equality of *initial* privilege is all that is guaranteed. So long as all *may* vote in the same manner, the privilege is not violated.[17] Although the argument outlined and criticized was the constitutional reason given by the court for its decision, the true basis is indicated only by the general tenor of the opinion. The court seemed to feel that cumulative voting was unjust and undesirable, and in so far as that attitude toward the legislation influenced the decision, the court was guilty of a questionable use of its judicial power.[18]

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[15] *Commonwealth ex rel. McCormick* v. *Reeder* (1895) 171 Pa. 505, 33 Atl. 67. The court considered the *Constantine* case, *supra,* footnote 12, and distinguished it on the ground that the "historical interpretation" of the Pennsylvania constitution differed from that of Ohio.

[16] *Supra,* footnote 3. See also *State ex rel. Shaw* v. *Thompson* (1911) 21 N. D. 426, 131 N. W. 231, at p. 238, and concurring opinions of Spalding, J. and Fisk, J.

[17] See *People ex rel. Longenecker* v. *Nelson* (1890) 133 Ill. 565, 596, 27 N. E. 217, 225.

[18] Cahill, J., in a dissenting opinion, (1890) 84 Mich. 228, 259, 260, 47 N. W. 756, 762, 763, makes what seems to be an inescapable criticism of the majority opinion in its abuse of its judicial power. "This court has no right to criticize or discuss the wisdom, the policy, the fairness or abstract justice of an act of the legislature. The supreme court is not the guardian of the legislature to see that it does no wrong. The legislature, when acting within the scope of its constitutional powers, is under no guardianship . . . " And further,—"It was undoubtedly contemplated by the framers of our constitution that the state should have and maintain a republican form of government with all that is implied; but it does not follow from this that it was intended that the judiciary should assume to decide what laws were best calculated to accomplish that end".

It has been suggested[19] that if the restricted vote is unconstitutional, cumulative voting is necessarily open to the same objection. Such a conclusion seems erroneous. The claimed unconstitutionality of the restricted vote rests upon the theory that every elector is privileged to vote for every officer to be elected,[20] and the cumulative vote is not in violation of that privilege. It specifically grants each elector that privilege, but in addition the privilege to "plump" or cumulate on one or more of the candidates. If it is to be deemed unconstitutional at all, it must be for an independent reason,—that one elector has the power to violate the privilege of others by making his vote count for one of the candidates more powerfully than that of another elector, and the merits of this reasoning have been discussed above. Cases involving the constitutionality of the restricted vote are not, therefore, authority where the cumulative vote is in question, however interesting are the analogies they present.

The validity of the preferential vote[21] was contested in 1915, under constitutional provisions entitling every elector to vote "for all officers . . . elective by the people",[22] and two courts reached diametrically opposite conclusions. In *Brown* v. *Smallwood*[23] the Minnesota court held the preferential vote unconstitutional. The inequality of privilege was again the argument relied upon; if one elector indicates only his first choice, another may indicate three choices against him. As authority for the unconstitutionality of the legislation on this ground, the cases dealing with the restricted and the cumulative vote discussed above were cited. An attempt has been made in a previous paragraph to show the fallacy of this argument. In *Orpen* v. *Watson*[24] this point was not raised and the preferential vote was held valid. The constitutional provision quoted was interpreted not to grant the privilege of voting for every individual officer to be elected, but rather to permit each elector to vote in every election according to the manner prescribed by the legislature.

Coming now to the principal case, the true basis of the decision is indicated in the court's quotation of a *dictum* in the *Maynard* case—"The Hare plan . . . is too intricate and tedious ever to be adopted for popular elections by the people".[25] Here again is that misuse of judicial power so

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[19] "If a restricted vote is unconstitutional, then it would seem that cumulative voting is open to the same objection. For assuming that an elector has a privilege under the constitution of casting a vote for a candidate for every elective office, it must follow that he has the privilege of registering himself as a full voting unit for each of those candidates. To allow a second elector to register more than one full voting unit for any one candidate, by cumulating his vote, would seem to impair the constitutional privilege of the first elector." (1915) 29 Harvard Law Rev. 213, 214.

[20] Either expressly by the constitution, *supra,* footnote 11; or by construction of the constitution, *supra,* footnote 12.

[21] The preferential vote is expressly provided for in the Oregon Constitution, Art. II, Sec. 16: "Provisions may be made for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office"; under which preferential voting was held constitutional in *State ex rel. Duniway* v. *City of Portland* (1913) 65 Ore. 273, 133 Pac. 62. The ordinary "preferential plan" allows each elector as many first choice votes as there are candidates to be elected. The theory of the Hare plan is that each elector is entitled to but one personal representative and he is therefore permitted to indicate but one first choice and his ballot counts toward the election of but one candidate. It is important to distinguish the two schemes.

[22] Minn., Const., Art. VII, Sec. 1; N. J. Const., Art. II, Sec. 1.

[23] *Supra,* footnote 4.

[24] (1915) 87 N. J. L. 69, 93 Atl. 853.

[25] (1890) 84 Mich. 228, 233, 47 N. W. 756, 757.

severely criticized by Justice Cahill in the passage quoted above.[26] Had the court limited itself to legal analysis and been willing to adopt a progressive electoral system properly chosen by the legislature, if not violative of fairly established constitutional principles, the constitutionality of the Hare plan could have been upheld in the instant case, and *Brown* v. *Smallwood,*[27] the only case on the preferential vote to the contrary, distinguished. The latter case arose under the Minnesota constitution entitling each elector to vote for every officer to be elected.[28] The corresponding section of the Michigan constitution[29] reads simply that "In all elections" every qualified voter "shall be an elector and entitled to vote". Since no privilege to vote for every officer is specifically granted, none need be inferred. It seems, therefore, that the constitutionality of the Hare plan in states having constitutional provisions similar to that of Michigan, if not indeed in all cases, must ultimately depend upon the power of its supporters to overcome the possible prejudices of the tribunal against any new electoral plan of minority representation.[30] *

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[26] *Supra,* footnote 18.
[27] *Supra,* footnote 4.
[28] *Supra,* footnote 22.
[29] Mich., Const., Art. III, Sec. 1.
[30] The unconstitutionality of the Hare plan in the instant case was also based upon a provision that "No city or village shall have power to abridge the right of elective franchise". Mich. Const., Art. VIII, Sec. 25. It is believed that this section has no bearing on the problem in question but refers only to qualifications for voters. *Cf.* dissenting opinion of Hallam, J., in *Brown* v. *Smallwood, supra,* footnote 4.

* The most recent survey of the progress of "P. R." is by J. F. Williams (1921) 3 Journ. of Comparative Legislation (3rd Ser.) 76.